

USDOL/OALJ Reporter

[*Agosto v. Consolidated Edison Co. of New York, Inc.*](#), ARB Nos. 98-007 and 98-152, ALJ Nos. 1996-ERA-2 and 1997-ERA-54 (ARB July 27, 1999)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 98-007
ALJ CASE NO. 96-ERA-2
DATE: July 27, 1999

In the Matter of:

ALBERT AGOSTO,
COMPLAINANT,

v.

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

and

RAYTHEON QUALITY PROGRAMS CO.,
RESPONDENTS.

ARB CASE NO. 98-152
(ALJ CASE NO. 97-ERA-54)

ALBERT AGOSTO,
COMPLAINANT,

v.

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Albert Agosto, Brooklyn, New York, *pro se*

For Respondent Consolidated Edison Company of New York, Inc.:

Kenneth G. Standard, Esq., Mary K. Schuette, Esq.,

David J. Reilly, Esq., Larry Carbone, Esq., New York, New York

For Respondent Raytheon Quality Programs Co.:

James Remeika, Esq., Lexington, MA

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

These cases arise under the employee protection provision of the Energy Reorganization Act (ERA), as amended, 42 U.S.C. §5851 (1994). In view of the common

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evidence and issues presented, and in the interest of administrative economy, the cases are hereby **CONSOLIDATED** for the purpose of decision. *See Bonanno v. Stone & Webster Eng'g*, ARB Case Nos. 96-110, 165, ALJ Case Nos. 95-ERA-54, 96-ERA-7, Dec. 12, 1996.

We have reviewed the records in these cases and conclude that they fully support the Administrative Law Judge's (ALJ) conclusions that the Complainant, Albert Agosto (Agosto), was not fired, rejected for rehire, or otherwise discriminated against for engaging in activities protected by the ERA. Accordingly, we shall dismiss the complaints.

BACKGROUND

I. ALJ Case No. 96-ERA-2 (Agosto I)

Agosto was hired on December 9, 1993, to work as a Quality Control (QC) Inspector during a refueling outage at Respondent Consolidated Edison Company of New York, Inc.'s (Con Edison) Indian Point 2 (IP 2) plant in Buchanan, New York. Agosto had worked at IP 2 on two previous occasions, but on this last occasion he performed services for Con Edison as an employee of Respondent Raytheon Quality Programs Co. (Raytheon), a contractor to Con Edison. Recommended Decision and Order dated October 14, 1997 (*Agosto I* R. D. & O) at 3. Agosto was informed that this assignment was temporary and expected to last less than one year. Con Ed Exhibit (CE) 00266. Agosto was assigned to inspect certain types of Class A work, including certain welding jobs, that were being performed in IP 2's Emergency Diesel Generator (EDG) Building. The steps for completing the welds were described in Weld Information Forms (WIFs).

Transcript in *Agosto I* (Tr. I) at 152- 154. WIFs also specify which steps require a quality control inspection and the type of inspection required.

On February 21, 1995, two mechanics were performing a weld pursuant to a WIF. Although Agosto had not been assigned supervisory authority over this particular job, he told the welders that they were improperly performing the weld and that it required inspection. The welders opined that the WIF indicated that no inspection was required on the weld. Tr. I at 3374-75. Joseph Sikora (Sikora), a Con Edison supervisor, overheard the conversation and asked Agosto why he believed an inspection was required. Agosto responded that the WIF was incorrect. In an attempt to resolve the issue, Sikora suggested to Agosto that if he believed an inspection was required, he should inspect the weld and later determine whether the WIF was correct. Tr. I at 3290-91.

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Agosto initially accepted this suggestion but several minutes later, after the completion of the weld, Agosto stated that he wanted to research the question of whether an inspection was required. Tr. I at 3295-97. Agosto walked away to make a phone call, and while on the phone he was approached by Sikora. Agosto alleged that while he was on the phone, Sikora tugged on his sleeve. Tr. I at 1592-94. Agosto then hung up the telephone and started walking back toward the weld when Richard Doyle (Doyle), a Con Edison engineer with overall responsibility for the EDG Building, approached him and ordered him to inspect the weld, or Doyle would get someone else who would inspect it. Tr. I at 2249-52, 3300. Agosto interpreted this statement as a "threat," and that same day went to see Nuclear Regulatory Commission (NRC) Resident Inspector Gordon Hunegs (Hunegs). Tr. 1596. Agosto did not file a complaint at that time but asked Hunegs what general "protection rights" were available to him as an inspector in a nuclear facility. Tr. I at 1606-07; *Agosto I* R. D. & O at 6. Hunegs told Agosto that one of his options was to file a complaint.

That same day, Agosto spoke with Sergei Brozski (Brozski), Con Edison's Quality Control Manager, and Bob Trombetta, a Quality Control Supervisor, about the incident, telling them that he was being harassed as a result of being forced to perform an inspection that was not required. Tr. I at 1276-78, 2464-65, 3392-93. Brozski asked Agosto how many consecutive days he had been working. Agosto stated that it was his seventh day in a row, during which he had worked about 72 hours. This amount exceeded Con Edison's rules regarding maximum consecutive work hours under outage conditions. Brozski concluded that, since he had worked so many hours and was still agitated by the WIF incident, Agosto should take the next day off. Tr. I at 3401. Sikora and Doyle were not sent home but ultimately were reprimanded for their behavior during the incident. Tr. I at 542-43.

During his discussion with Brozski, Agosto told him that he was not getting along with the personnel in the mechanical section of the construction group whose work he primarily inspected. In response, Brozski asked if he would prefer to be assigned to the

electrical section. Tr. I at 309-10. When Agosto returned to work after his day off, he told Brozski that he wanted to be transferred. Tr. I at 333- 34. Agosto was then transferred to the electrical section of the construction group.

Soon after the transfer, Brozski learned that Agosto was having conflicts with workers in the electrical construction section. At one point Agosto got into an argument with a Con Edison employee that ultimately led to the issuance of an Open Item Report (OIR). OIRs were written to report conditions not in conformance with applicable standards. About 1200 OIRs were written during an outage year. Tr. I at 553, 2095.

As a result of the conflicts, Brozski asked Agosto if he wanted to work with the House Maintenance group. Tr. I at 572-573. The inspection work performed was similar; the only difference was that the Construction Group primarily worked on modifications and the House Maintenance group worked on preventative maintenance. *Agosto I R. D. & O* at 18. Agosto was reassigned and did not file any complaint with Con Edison or the NRC.

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In June 1995, Con Edison learned that the site where it had been previously storing radioactive waste was reopening to receive out-of-state waste. Tr. I at 448-52. The reopening meant that Con Edison no longer needed to complete construction of an on-site radioactive waste storage facility. As a result, Con Edison decided that the four remaining contract inspectors who had been brought in to work during the outage, including Agosto, were no longer needed. Tr. I at 2483-84. Accordingly, Con Edison notified the inspectors that their services would be terminated. T 663-70. After Agosto was informed of his layoff he filed complaints with the NRC and the Department of Labor's Wage and Hour Division.

Agosto alleged that during his employment at Con Edison, he was retaliatorily reprimanded, deprived of a day's work and pay, transferred, and ultimately terminated because of the aforementioned incidents as well as his general diligence in bringing safety violations to Con Edison's attention. He also alleged that subsequent to his lay off by Con Edison, performance evaluations were prepared recommending that he not be rehired, and that these poor evaluations were in retaliation for engaging in activity protected under the ERA. *Agosto I R. D. & O.* at 2.

The Wage and Hour Division and the NRC separately investigated Agosto's claims and concluded that they were without merit. Agosto requested a hearing, which was held before ALJ Jeffrey Tureck over a thirteen-day period between August and September 1996. On October 14, 1997, the ALJ issued a recommended decision concluding that: (1) Con Edison did not take any adverse action against Agosto for engaging in activity protected by the ERA; (2) Agosto was laid off because work for him was no longer available; and (3) unfavorable evaluations of Agosto's performance prepared by his supervisors following his layoff in 1995 recommending that he not be rehired were not

retaliatory, but were an accurate reflection of Agosto's performance. *Agosto I* R. D. & O at 16-20.

II. ALJ Case No. 97-ERA-54 (Agosto II)

In the fall of 1996, Con Edison was preparing for an outage at IP 2 scheduled to begin in early 1997 and decided to hire additional QC inspectors. Agosto applied for one of these positions through Spec, the contractor supplying the QC inspectors for that outage. Spec referred Agosto's application to Con Edison, but he was rejected. Agosto filed a complaint with the Occupational Safety and Health Administration (OSHA) on May 30, 1997, alleging that Con Ed refused to rehire him because he had engaged in the protected activity that was the subject of *Agosto I*.

OSHA determined that Agosto's complaint was without merit, and Agosto requested a hearing. The case was assigned to ALJ Tureck. Con Edison filed a motion for summary dismissal of the complaint, arguing that Agosto was not rehired as a result of the adverse evaluation of his performance during the previous outage, and that the ALJ had already ruled in *Agosto I* that Agosto's performance evaluations were an accurate reflection of his performance. On April 23, 1998, the ALJ issued an order denying Con Edison's motion for summary judgment because there remained a possibility

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that the performance evaluations were not the reason Agosto was rejected for employment for the Spring 1997 outage:

Complainant is entitled to the opportunity to prove that the four performance evaluations were not the basis for this decision. Although it is not clear at this time how complainant intends to prove that respondent's explanation for his rejection is pretextual, complainant must be provided the opportunity to put on his case at a hearing. Accordingly, the motion for summary decision is denied. Complainant must be cautioned, however, regarding the scope of the upcoming hearing. In the recommended decision in 96-ERA-2, I determined that the four performance evaluations prepared in September, 1995 by Ferretti, Margrey, Trombetta and Fitzgerald were reasonable evaluations of complainant's performance and were not retaliatory. Since the issue was fully litigated in the prior proceeding between these parties and was an integral part of the decision, it is binding in the current case under the doctrine of collateral estoppel.

Order Denying Motion for Summary Judgment and Notice of Hearing dated April 23, 1998, at 2.

A hearing was held before the ALJ from July 20-23, 1998. Although the ALJ informed Agosto that he was permitted to litigate the issue whether Con Edison's decision not to hire him for the 1997 outage was because of Agosto's protected activity, Agosto's

questioning of the witnesses during the hearing instead focused on whether the performance evaluations given following his previous work at IP 2 accurately reflected his past performance. The ALJ sustained Con Edison's objections to Agosto's line of questioning and on several occasions attempted to help Agosto better frame his inquiries. On the third day of the hearing Agosto walked out of the courtroom, apparently frustrated with his inability to ask witnesses about incidents related to his 1995 performance evaluations. Transcript in *Agosto II* (Tr. II) at 1019. Holding that Agosto had failed to present a *prima facie* case that he was rejected due to his protected activity, the ALJ granted Con Edison's motion to dismiss the complaint. Tr. II at 1022; Recommended Decision and Order dated July 27, 1998 (*Agosto II* R. D. & O) at 5-6. Thereafter, Agosto filed a petition for review with the Administrative Review Board, appealing this second ALJ decision.

DISCUSSION

To prevail under the employee protection provision of the ERA, a complainant must prove by a preponderance of the evidence that he or she was subjected to adverse action, at least in part, because he or she engaged in activities that are protected under the ERA. See *Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386 (8th Cir. 1995).

The records in these cases have been thoroughly reviewed, and we find that they fully support the ALJ's findings of fact. We deal with the two cases in turn.

I. Agosto I

Agosto failed to prove that he was reprimanded, deprived of a day's pay, or transferred for engaging in protected activity. First, Brozski's decision to order Agosto to take a day off following the February 21, 1995 incident in the EDG Building was not in retaliation for challenging the information on the WIF. Instead, Brozski concluded that Agosto had worked too many hours and needed

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a day to "cool off" after the incident. Nor was Agosto sent home for talking to the NRC's Hunegs. Agosto testified that at no time on February 21, 1995, did he tell any Con Edison manager that he had spoken with Hunegs, and there is no evidence that anyone in Con Edison's management knew of the visit from any other source. Tr. I at 1601-02.

Second, Agosto was not transferred because he engaged in protected activity that resulted in the issuance of an Open Item Report. The issuance of OIRs was a routine event at IP 2, and no evidence supports a conclusion that this particular OIR created any concern among his supervisors. To the contrary, the transfers were voluntary and were suggested by Brozski as a result of Agosto's unruly behavior and his inability to work productively with other employees at IP 2. The record is replete with evidence that

although Agosto was a competent inspector, he had disagreements with virtually everyone with whom he worked at IP 2. Tr. 210-12, 334-38, 1332-36, 2426-38, 2696-97, 3377-80, 3093-97, 3237-39, 3291-97. Even when an employee has engaged in protected activities, an employer legitimately may discipline him or her for "insubordinate behavior, work refusal, and disruption." *Abu-Hjeli v. Potomac Electric Power Co.*, Case No.89-WPC-1, Sec'y Dec., Sept. 24, 1993, slip op. at 17, citing *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986).

Third, it is apparent that Agosto was laid off after the outage because work for him was no longer available. Agosto was one of the first of the contract inspectors hired in connection with the outage, and was the last to be let go. Although he attempts to characterize his removal from employment as contentious, Agosto stated in his Personnel Exit Interview that he was laid off due to lack of work. CE- 00051. According to one of Agosto's supervisors, Agosto should have been fired earlier for his behavior, but upper management resisted doing so since the outage was coming to an end. *Agosto I R. D. & O.* at 5.

Fourth, we agree with the ALJ's conclusion that the performance evaluations prepared following his employment at Con Edison were not retaliatory, but were an accurate reflection of his performance. *Agosto I R. D. & O.* at 19-20. As we noted above, Agosto was a technically proficient, but unruly and disruptive employee:

The record reflects performance evaluations dated September 25, 1995 from QA supervisors Ferretti, Margrey, Trombetta, and Fitzgerald (CX 49). Each rates complainant highly in regard to his technical ability. Yet Margrey, Trombetta and Fitzgerald rate him very low in working with others and in attitude, and recommend that he not be rehired. Ferretti gave complainant a middle rating in attitude and working with others. However, noting complainant's refusal to perform a job because he felt it was "demeaning," Ferretti gave complainant the second lowest rating in the "Recommend to Rehire" category.

Agosto I R. D. & O. at 19. We find nothing in the record which would support a conclusion that these evaluations were written for retaliatory reasons.

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For all of these reasons we conclude that Agosto was not retaliated against for engaging in protected activity when he was ordered to take a day off of work, was voluntarily transferred with no loss in pay, was laid off when the contract work was completed, and when negative performance evaluations were prepared and placed in Agosto's file after his layoff.

II. Agosto II

We agree with the ALJ that Agosto failed to present a *prima facie* case that he was retaliated against by Con Edison when he was not selected to work during the 1997 outage. Con Edison based its rejection of Agosto on the performance evaluations he had received after his previous employment, which recommended against re-hire. Because we agree with the ALJ's finding in *Agosto I* that those performance evaluations were not given for retaliatory reasons, but instead accurately reflected Con Edison's evaluation of Agosto's work, we conclude in *Agosto II* that Con Edison's reliance upon the negative recommendations contained in those evaluations was not retaliatory. However, although we reach the same conclusion as the ALJ in *Agosto II*, we decline to adopt his analysis.

In *Agosto II* the ALJ refused to allow Agosto to relitigate the veracity of the performance evaluations given to him when he was laid off in 1995, characterizing this decision as being consistent with the doctrine of collateral estoppel. *Agosto II* R. D. & O. at 3. This was error. Four elements must be met for collateral estoppel or to use the more appropriate term, issue preclusion to apply: (1) the issues of both proceedings must be identical, (2) the relevant issues must have been actually litigated and decided in the prior proceeding, (3) there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding, and (4) the issues must have been necessary to support a valid and final judgment on the merits. *See, e.g., Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986), *cert. denied*, 480 U.S. 948, 107 S.Ct. 1608, 94 L.Ed.2d 794 (1987). Pursuant to the regulatory scheme established under the ERA's employee protection provision, the ALJ issues a *recommended* decision, which is subject to *de novo* review by the Administrative Review Board. 29 C.F.R. §24.7; *see* 5 U.S.C. §557(b). Thus, issue preclusion could not properly have been invoked by the ALJ in *Agosto II* with regard to his recommended decision in *Agosto I* because the "relevant issues" had not yet been "decided in the prior proceeding."¹

However, as we now affirm the ALJ's recommended finding in *Agosto I* that the evaluations of Agosto were not retaliatory, we hold that any error on the ALJ's part in excluding further testimony on that issue in *Agosto II* was harmless.

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Finally, Agosto did not offer any evidence to support his alternative contention that the performance evaluations were not the basis for Con Edison's refusal to rehire him:

Although complainant failed to testify, there is no reason to believe he had any concrete evidence to support his contention that he was rejected for rehire due to his protected activity. Certainly nothing in his proposed exhibits support[s] his position; and his questioning of the witnesses who did testify leads me to conclude that he was not in the possession of any information which supported his case. Instead, it seems he was hoping to stumble upon something while questioning the witnesses who he believed played a role in the decision not to rehire him, but nothing turned up.

Agosto II R. D. & O. at 5.

For these reasons, Agosto failed to present a *prima facie* that he was retaliated against for engaging in protected activity when Con Edison declined to hire him for the IP 2 outage.

CONCLUSION

Agosto proceeded in these cases *pro se*, and was accorded considerable latitude by the ALJ. However, he did not meet the requisite standard of proof that the adverse actions taken against him were, even in part, motivated by protected activity. We concur with the ALJ's recommendations that the complaints should be dismissed.

ORDER

For the foregoing reasons, the complaints are **DISMISSED**

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

[ENDNOTES]

¹ The ALJ might have invoked Section 18.403 of the Rules of Practice and Procedure of the Department of Labor's Administrative Law Judges to exclude evidence in *Agosto II* regarding the facts underlying the performance evaluations. That section provides in pertinent part that "evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of issues, or misleading the judge as trier of fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 29 C.F.R. §18.403.